COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-02531

DIRECTORS OF THE ONE SALEM STREET IMPROVEMENT ASSOCIATION, INC.
Plaintiffs/Defendants-in-Counterclaim

vs.

JOSEPH MARCHESE, JR.
Defendant/Plaintiff-in-Counterclaim

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this action, the plaintiff directors of the One Salem Street Improvement Association, Inc. ("the Association"), seek to recover unpaid common expenses from the defendant lot owner, Joseph Marchese, Jr. ("Marchese"). In its amended complaint, the Association brought three counts: one to establish the defendant's debt, one to place a lien on his lot, and one to establish the lien's priority under the homeowners association's declaration and by-laws. Marchese asserted a counterclaim for declaratory relief, seeking a determination that the Association's "Revised Declaration and Establishment of Covenants, Conditions, Reservations and Restrictions for One Salem Street" ("the Revised Declaration"), enacted on March 2, 1982, and recorded with Marchese's deed, terminated on December 31, 2009, and is of no force and effect against Marchese or his property.

The matter is before the court on Marchese's motion for summary judgment on his counterclaim and the Association's cross-motion for summary judgment on its amended complaint and Marchese's counterclaim. The Association also seeks to recover its attorney's fees

and costs, in accordance with the Revised Declaration and the Association's amended by-laws. For the reasons set forth below, the Association's cross-motion for summary judgment is **ALLOWED** as to its amended complaint. With respect to the cross-motions for summary judgment on Marchese's counterclaim, a declaration is set forth in the order.

BACKGROUND

The material facts are not in dispute. The Association was formed to administer the declarations and by-laws of the One Salem Street Subdivision ("the Subdivision"), a residential subdivision in Swampscott comprising forty-five lots. Marchese acquired title to Lot 19A in the Subdivision by a deed dated July 23, 1986. The deed recites in relevant part that "[s]aid premises are conveyed subject to and with the benefit of (1) the Revised Declaration and Establishment of Covenants, Conditions, Reservations and Restrictions for One Salem Street recorded in said Registry at Book 6920, Page 272 . . . [and] (3) By-Laws of One Salem Street Improvement Association, Inc., recorded at Book 6938, Page 574 in said Registry . . . ."

Paragraph 3 of the Revised Declaration provides that "each and every lot owner, in accepting a deed, agrees to and shall be a member of and be subject to the obligations of the duly enacted By-Laws and Rules and Regulations of [the Association]." Paragraph 11 states that "[i]n accordance with the By-Laws of the Improvement Association, there shall be common charges as determined from time to time by the homeowners of the various lots . . . ."[1]

The Revised Declaration also provides, at Paragraph 12, that it shall terminate on December 31, 2009, "provided, however, that these Revised Covenants, Conditions,

[1] Article Five of the By-Laws in effect when Marchese purchased his lot grants the Association the authority, inter alia, to collect common charges, and Article Eight provides that a lot owner or occupant in violation of the By-Laws shall be responsible to the Association for all costs and legal fees incurred in the enforcement thereof. The Association's current By-Laws, as amended October 10, 2000, contain similar provisions at Articles Seven, Nine, and Fourteen.

Reservations and Restrictions shall [b]e automatically extended for a period of ten years, and thereafter in successive ten year periods, unless on or before the end of one such extension period or the base period, the owners of a majority of the lots in the Subdivision shall by written instrument, duly recorded, declare a termination of the same."

In April 2008, the Association requested that all lot owners sign an amendment to extend the term of the Revised Declaration through December 31, 2039. The proposed amendment included a recitation that "all lot owners have signed" the document. On September 29, 2009, the homeowners association sent a "Notice of Special Meeting" to all lot owners indicating that "it appears that not every lot owner will sign." It requested that the owners who had signed the proposed amendment sign a form authorizing the Association to record the amendment, notwithstanding the fact that not all lot owners will have signed, and to modify the recitation in the proposed amendment that indicated incorrectly that "all lot owners have signed." The letter noted that the effect of this action would be "an agreement by all of the signatories to be bound by the First Amendment to the same extent as if all lot owners had signed." It further provided that "[r]egardless of the outcome of the amendment process, all of the lot owners, both the signatories and non-signatories, will remain responsible for their respective shares of the costs, as they have been in the past."

Marchese refused to sign the proposed amendment or the subsequent authorization. On October 6, 2009, he wrote a letter to the Association giving notice that he would no longer be bound by the restrictions in the Revised Declaration, nor would he pay his Association common charges, beyond December 31, 2009.

On December 22, 2009, the Association recorded a "Notice of Extension of Restrictions

under G. L. c. 184, § 27," executed by more than fifty percent of the Subdivision's lot owners, which purported to extend the Revised Declaration through December 31, 2019.

DISCUSSION

Marchese argues that the Revised Declaration terminated on December 31, 2009, by operation of G. L. c. 184, §§ 23, 26-30, which limits the enforceability of restrictions to thirty years unless certain conditions are met. He submits that recent judicial interpretations of the relevant statutory provisions suggest that the Revised Declaration's automatic extension provision is not sufficient to keep the restrictions in effect beyond their stated expiration date. Marchese also suggests that, because the Association's sole purpose is to enforce the Revised Declaration, it ceased to exist after December 31, 2009, when the Revised Declaration expired.

The Association argues that: (1) it is categorically exempt from G. L. c. 184, cf. Johnson v. Keith, 368 Mass. 316 (1975) (condominium exemption); and (2) even it is not exempt, the requirement that Marchese pay common charges is an affirmative equitable servitude, not a restriction on the use of his property. Alternatively, the Association argues that Marchese's obligation to pay dues constitutes a implied-in-fact contract.

The Association also contends that it did not require the unanimous written consent of all lot owners to amend its Revised Declaration to extend it beyond December 31, 2009. It submits that the Revised Declaration has been extended through December 31, 2019, by the timely recording of an instrument signed by a majority of restricted lot owners. Moreover, the Association argues, the Revised Declaration, which was enacted on March 2, 1982, and recorded

on March 30, 1982, has not even reached the thirty-year mark so as to trigger application of G. L. c. 184, § 27(b)(1).[2]

With respect to the Association's exemption argument, this court is reluctant to afford homeowners associations a wholesale exemption from G. L. c. 184 based solely on dicta in Johnson v. Keith, 368 Mass. 316 (1975), which states that condominium restrictions that are amendable by unit owners are more akin to municipal by-laws than to restrictive covenants. However, an exemption is not necessary to resolve the cross-motions in the Association's favor.

I. Marchese's obligation to pay common charges

The court concludes that the Revised Declaration did not expire on December 31, 2009, as it was validly extended in accordance with both the terms of the Revised Declaration itself and the requirements of G. L. c. 184, § 27(b).

However, even if the Revised Declaration had expired, Marchese's obligation to pay common charges to the Association is an equitable servitude that exists independent of restrictive covenants contained in his deed and his acceptance of the Association's services for approximately twenty-three years creates an implied-in-fact contract. See Sullivan v. Gibbs, 2010 WL 2623674, at *6 (Mass. Land. Ct. June 30, 2010) (Trombly, J.) (obligation to pay bi-annual assessments to homeowners association was in nature of implied contract and equitable

[2] The parties seem to agree that the Subdivision reflects a common scheme and that § 27(b)(2), which governs "other restrictions," therefore does not apply. Section 27 provides in relevant part: "No restriction imposed after December thirty-first, nineteen hundred and sixty-one shall be enforceable: . . . (b) after thirty years from the imposition of the restriction, unless . . . (1) the restriction is imposed as part of a common scheme applicable to four or more parcels contiguous except for any intervening streets or ways, and provision is made in the instrument or instruments imposing it for extension for further periods of not more than twenty years at a time by owners of record, at the time of recording of the extension, of fifty per cent or more of the restricted area in which the subject parcel is located, and an extension in accordance with such provision is recorded before the expiration of the thirty years or earlier date of termination specified in the instrument and names or is signed by one or more of the persons appearing of record to own the subject parcel at the time of such recording, and in case of such recording, twenty years, or the specified extension term if less than twenty years, has not expired after the recording of any such extension without the recording of a further like extension."

servitude, and therefore survived expiration of deed restrictions); Samuel v. Scorton Shores, 10 Mass. Land. Ct. 11, 14 (2002) (Lombardi, J.), aff'd, 60 Mass. App. Ct. 1105 (2003) (Memorandum and Order Pursuant to Rule 1:28) (obligation to pay share of road maintenance expenses was equitable servitude, not restrictive covenant subject to G. L. c. 184, and therefore was binding even after deed restrictions expired).

Marchese's argument that the Association is bound by the Revised Declaration's inartful reference to the lot owners' obligations as "restrictive covenants" is unavailing. The nature of Marchese's obligation to pay common charges, rather than the label that the Association assigned to said obligation, is what controls the analysis. This conclusion is bolstered by the fact that the affirmative obligation to pay common charges also appears in the Association's By-Laws, which are cited in Marchese's deed and do *not* refer to the obligation as a "restrictive covenant." Marchese has not offered a cogent explanation as to why his debt to the Association is not independently enforceable under the By-Laws, regardless of whether or when the Revised Declaration expired.

Although Marchese does not dispute that he took his lot subject to the Revised Declaration, he insists that, even under the Land Court's reasoning in Sullivan, he cannot be held to an implied agreement to continue paying dues to the Association because he consented only to be bound by fee obligations *that expired by their terms on December 31, 2009.*[3] While his argument has some superficial appeal, the Revised Declaration to which his lot is subject also

[3] Implicit in Marchese's argument against an implied-in-fact contract to pay common charges is his position that he need not pay because he no longer avails himself of the Association's services. Curiously, he advances this argument even after sending a letter to the Association's property manager on January 11, 2011, in which he alluded to the Supreme Judicial Court's decision in Papadopolous v. Target Corp., 457 Mass. 368 (2010), and demanded that the snow be removed from his property. One assumes that Marchese is merely hedging his bets while litigation is pending, and that he would stop requesting the Association's services if the court were to rule that his property is no longer encumbered.

contains a mechanism for extending its provisions beyond the initial term. As the court explains below, the Association validly extended the terms of Revised Declaration.

II. Operation of G. L. c. 184, § 27(b)

The Revised Declaration was validly extended in accordance with its own terms on December 22, 2009, shortly before its initial term was set to expire. Chapter 184, § 27's prohibition on the enforcement of land use restrictions is not triggered until thirty years from the imposition of the restrictions—in this case, March 30, 2012. Until that date, the parties' rights and obligations under the Revised Declaration are governed by the terms of the document itself, and are not limited by the operation of G. L. c. 184, § 27(b).[4]

The Revised Declaration itself was properly extended beyond December 31, 2009, whether by the affirmative vote recorded on December 22, 2009, or by the owners' passive acceptance of a ten-year extension by virtue of their decision not to terminate the agreement. Marchese, as a lot owner whose property is subject to the Revised Declaration, is presently bound by its terms. Whether those terms are enforceable beyond March 30, 2012, is a separate question and, as discussed above, Marchese's present obligation to pay common charges is not dependent on the resolution of this issue.

One might argue that the issue of the Revised Declaration's enforceability beyond March 30, 2012, is not ripe for a declaration because the Association has nearly a year in which to

[4] The court notes that the language requiring that "an extension in accordance with such provision [be] recorded before the expiration of the thirty years *or earlier date of termination specified in the instrument*" is somewhat confusing, as it appears to contemplate that restrictions that expire before thirty years are also subject to § 27(b)(1)'s notice requirements. G. L. c. 184, § 27(b)(1) (emphasis added). Read together with the statute's prohibition on the enforcement of restrictions only after thirty years, however, nothing in § 27(b)(1) limits the enforceability of the Revised Declaration (or the validity of its automatic renewal provision) until at least thirty years have passed since its enactment. Section 27(b)(1) only provides a mechanism for extending the enforceability of restrictions beyond thirty years. It does not state that extensions recorded *before* thirty years have passed are unenforceable if they do not satisfy the requirements of § 27(b)(1).

address any perceived deficiencies in the drafting of its Revised Declaration and/or Notice of Extension, if it so chooses. However, the court addresses the issue to avoid future litigation. Indeed, under Marchese's proposed interpretation of G. L. c. 184, § 27(b)(1), the Association's failure to comply with the statute is irremediable at this point because the deadline for effecting a proper extension expired on December 31, 2009, which means that any future amendment to the Revised Declaration to comport with the letter of § 27(b)(1) would be null and void.

The court agrees with the Association's view that a fair reading of § 27(b)(1) does not require the Association to use "magic language" in the Revised Declaration itself to effect a valid extension. The statute requires that "provision is made in the instrument or instruments imposing it for extension for further periods of not more than twenty years at a time by owners of record, at the time of recording of the extension, of fifty per cent or more of the restricted area in which the subject parcel is located." G. L. c. 184, § 27(b)(1). Here, the Revised Declaration provides for extension periods of "not more than twenty years at a time" (in this case, ten), subject to automatic renewal unless a majority of record owners (i.e., "fifty per cent or more") votes to terminate.

Contrary to Marchese's position, the statute does not "expressly and unambiguously contemplate[] that **some affirmative action** by the affected property owners must be taken in order to extend the effective date of a restriction." Pl. Memo. in Opp. to Cross-Motion, p. 8 (emphasis in original). While it would certainly be better practice for the Association to make provision for an affirmative vote—if only to avoid hypertechnical arguments such as the one Marchese advances—the statute does not strictly require it. Nothing in the common-scheme provision that calls for "extension for further periods . . . by owners of record . . . of fifty per cent

or more of the restricted area" expressly requires that the Revised Declaration spell out the manner in which a majority of record owners must vote for an extension, let alone dictates that the owners cannot passively ratify an extension by declining to exercise their option to terminate. G. L. c. 184, § 27(b)(1). The statute is certainly not so clear as to compel this court to invalidate the December 22, 2009 extension, which *was* an affirmative act that complied with the terms of § 27(b)(1), simply because Paragraph 12 of the Revised Declaration itself does not parrot the statute.

Against the backdrop of the appellate courts' instruction that deed restrictions "have to be construed 'with a view of avoiding results which are absurd, or inconsistent with what was meant by the parties to or the framers of the instrument,'" Maddalena v. Brand, 7 Mass. App. Ct. 466, 469 (1979), quoting from Chase v. Walker, 167 Mass. 293, 297 (1897), this court rejects an application of G. L. c. 184, § 27, that would allow owners like Marchese to run roughshod over the grantor's clear intent that the terms of the Revised Declaration and By-Laws would bind all lot owners in the Subdivision until such time as a majority of restricted owners decided to terminate the Association.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Association's motion for summary judgment be **ALLOWED** as to the counts in its amended complaint. It is further **ADJUDGED** and **DECLARED** that:

(1) General Laws c. 184, § 27, does not prohibit the Association's present enforcement of the terms of the Revised Declaration, because the statute does not apply until March 30, 2012, at the earliest; and

(2) To the extent that there is still a real controversy as to whether the December 22, 2009 Notice of Extension will become invalid after March 30, 2012, on the grounds that the Revised Declaration does not set forth a mechanism for extensions that mimics the language in G. L. c. 184, § 27(b)(1), the statute does not require such exactitude in the drafting of the instrument, and the Notice of Extension itself met the statutory requirements. Therefore, the Revised Declaration is of full force and effect against all lot owners in the Subdivision through December 31, 2019.

The matter will be scheduled for an assessment of the outstanding balance of common charges and fees, as well as the Association's costs and attorney's fees.

Richard E. Welch, III
Justice of the Superior Court

DATED: March 30, 2011